

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1928

The City's Liability on Street Improvement Bonds in Iowa

Frank Horack Jr.

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>



Part of the [Infrastructure Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Horack, Frank Jr., "The City's Liability on Street Improvement Bonds in Iowa" (1928). *Articles by Maurer Faculty*. 2490.
<http://www.repository.law.indiana.edu/facpub/2490>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

JUDICIAL DECISIONS

EDITED BY C. W. TOOKE

Professor of Law, Georgetown University

The City's Liability on Street Improvement Bonds in Iowa.—A recent decision of the Supreme Court of Iowa, holding a city liable for the issuance of street improvement bonds, will no doubt act as a warning to municipalities in this state in the issuing of such bonds in the future.¹ The Iowa law authorizes cities and towns to assess the cost of street improvements against property subject to assessment therefor, and the council is empowered to issue bonds for the amount of the assessed cost or any part thereof in anticipation of the deferred payment of the assessments.

The statute prescribes the form in which such street improvement bonds shall be issued, which among other things must contain the statement:

It is hereby certified and recited that all the acts, conditions, and things required to be done, precedent to and in issuing this series of bonds, have been done, happened, and performed, in regular and due form, as required by law and said resolution, and for the assessment, collection and payment hereon of said special tax, the full faith and diligence of said city (or town) of — are hereby irrevocably pledged.²

It is also provided that

Such certificates, bonds, and coupons shall not make the city liable in any way, except for the proper application of said special taxes.³

Many cities have found, for one reason or another, that there was no money in the special fund to pay the principal and interest on the last bonds in the series. Cities have usually contended that they were not liable under the statute for indebtedness incurred in this manner.

On December 13, 1927, the Supreme Court of Iowa passed upon this question in a test case which involved four different street improvements' bonds of the city of Des Moines. The court reaffirmed a previous decision that a "city can render itself liable if in breach of the terms of the bond it wrongfully fails to perform its duty and its pledge pertaining to the assessment and collection of the special tax by which the special

fund is to be created,"⁴ and the court further held that while these street improvement bonds did not of themselves create an indebtedness of the city, they did, however, create an obligation of the city to perform certain statutory duties in the levy and collection of special taxes for the payment of the bonds. "The liability of the city," said the court, "arises out of the breach of the obligations of the bond. The cause of action of the bondholder is in the nature of damages for such breach. The measure of his damages is necessarily the unpaid amount of the bond which has been rendered uncollectable by the wrongful breach. In view of the fact that the measure of damage is specific and is identical with the amount of the bond, the distinction between an action *on the bond*, and an action for the breach of it, becomes a mere matter of words."

Four different bonds were involved in this case:

1. Payment on the first bond had been refused by the city treasurer on the ground that there was no fund out of which it could be paid. The court held that it was the duty of the city to provide by special assessment a fund sufficient to pay the bonds and the interest on them.

2. In the second bond it appeared that provision had originally been made for special assessments sufficient to pay off all the bonds in the series, but that certain property owners assessed successfully prosecuted appeals in the district court, which materially reduced the anticipated collections for the special assessment fund and thus made the plaintiff's bond uncollectable. The court held the city at fault for not making up the deficiency by reassessing the amount of such depletion against the abutting property. "Its duty at this point," said the court, "was no less than its original duty to make an assessment adequate to the payment of the bonds."

3. In the third case a bond for \$200 was rendered uncollectable because certain property owners had failed and refused to pay their

¹ *Hauge v. City of Des Moines*, 216 N. Y. 689.

² *Code of Iowa*, 1927, Sec. 6114.

³ *Ibid.*, Sec. 6123.

⁴ *Fort Dodge Electric Co. v. City of Fort Dodge*, 115 Iowa 568.

assessments and the county treasurer had failed to collect the same by tax sale for want of a bidder. Here the court held that the city had wholly failed to exercise its statutory power in the making of such collections and had breached its pledge of good faith and diligence to that end. The city could have bid in the property and thus enforced its lien.

4. The fourth bond was the last in its series, which could not be paid for lack of funds, because the assessments on certain properties were in excess of 25 per cent of their value. Some of the owners refused to pay the tax, and the county treasurer found no bidders at tax sale, but at an adjourned tax sale the properties were sold for less than the amount of the tax, thus making the deficiency in the fund. The court made quick work of this case, declaring that if the assessment had been confined to 25 per cent of the value of the property, as provided by law, the full amount of the tax could have been collected by tax sale.

In the light of this decision there seems to be nothing for the cities which have defaulted on public improvement bonds to do but to accept their liability. The *American Municipalities* for January, in commenting upon this decision, seems to imply that cities would be better off if they issued "certificates" instead of bonds. In view of another recent decision of the Supreme Court of Iowa in the case of *Western Asphalt Paving Company v. City of Marshalltown*,¹ it would seem that there is little opportunity for a city in this state to escape its liability for either bonds or certificates issued in payment of public improvements. This is, no doubt, as it should be, and these decisions should serve as a warning to city councils and the taxpayers alike that when public improvements are undertaken which are payable by special assessments upon the benefited property, the greatest care must be exercised to make sure that the property assessed will be able to pay out. When the city asks the contractor or the public to take these street improvement bonds and certificates, the good name and credit of the city demands that the city make good any deficiencies arising from errors of judgment or negligence on the part of the city authorities. If this were not so, cities might find it difficult to finance such improvements because of lack of confidence on the part of contractors and investors in special assessment securities.

The decision will no doubt work a hardship

upon those cities whose over-optimistic councils have forced street improvements upon their communities in advance of their needs and beyond the ability of the property assessed to meet the payments. But when city councils realize that street improvement bonds will become general obligations of the city, unless properly and legally assessed, they will weigh more carefully the objections of property owners before disregarding them.

FRANK E. HORACK.

The State University of Iowa.



Special Assessments—Direct Liability of City on Bonds Issued.—The interesting note by Professor Horack on the case of *Hauge v. Des Moines* suggests a comparison with another recent case involving the same point. In *Moore v. City of Nampa*, 18 Fed. (2d) 860, decided by the Circuit Court of Appeals, ninth circuit, in April, 1927, the bonds in question contained recitals similar to those in the Hauge case, and the liability of the city was likewise predicated upon the negligence of the city in failing to perform its statutory duties to make a valid levy and collect the funds to pay the bonds. The Idaho statute provided that the holder of such bonds "shall have no remedy therefor against the municipal corporation by which the same is issued in any event, except for the collection of the special assessment made . . . , but his remedy in case of non-payment shall be confined to the enforcement of such assessment." The court affirmed a judgment of the district court sustaining a demurrer to the complaint.

These two cases illustrate the conflict of decisions that prevails in this class of cases based upon like facts, but the great weight of authority is in support of the view of the Circuit Court of Appeals. If the city is relieved of direct liability, the bondholder has a remedy by mandamus to compel the proper officers to make a new or supplementary assessment and collect the necessary funds to liquidate the bonds. The earlier cases bearing upon the general question of the direct liability of the special assessment district are reviewed in an extensive note to *Capitol Heights v. Steiner*, 211 Ala. 640, 101 So. 451, published in 38 A. L. R. 1271 (1925). The Hauge case is supported by a long line of decisions in Iowa (note, 18 Iowa Law Review 81), and evidently the only method left open to avoid the direct liability of municipal corporations on that state is by an amendment to the enabling

¹ 214 N. W. 687 (Iowa, 1927).

act further expressly restricting the right of the bondholder against the city to a remedy by mandamus and requiring a recital in the bond itself of such a limitation and that it is payable only out of proceeds of the funds raised by the special assessment. As the constitutional limitations upon municipal indebtedness are uniformly held not to apply to judgments in tort, the evil of excessive direct obligations upon the city, resulting from failure to perform statutory duties of this nature, should be kept within reasonable bounds wherever, as here, it can be done without injustice to anyone.



Municipal Functions—Airports.—The Supreme Court of Kansas in *Wichita v. Clapp*, 263 Pac. 12, decided January 7 of this year, holds that a city of the first class under its power to acquire lands within five miles of its limits for park purposes may take land for a park, 70 per cent of which is to be used for an aviation field. The court in its opinion reviews the progress of aviation and cites the statutes of various states expressly conferring the power in question. It also reviews the decisions which show the extension of park functions to include tourist camps and other new social activities. This progressive view of the extension of the implied power of municipalities by the change in social conditions is not followed by some states (*Kennedy v. Nevada*, 281 S. W. 56, Mo. 1926), and therefore the express delegation of the power to establish airports is advisable. (See Act No. 328, Pa. Laws of 1925, Ch. 534, Sec. 57, Mass. Laws 1922, Sec. 3667, par. 15, General Code of Ohio.) Upon the general subject of the extension of municipal functions, the reader may be referred to a note published in the August, 1926, number of this REVIEW.



Zoning—Control over Building on Manufacturing Property Included in Residence District.—The Supreme Court of Pennsylvania in *In re Giffillan's Permit*, 140 Atl. 136, has refused to follow the extremely broad application of the police power which was affirmed by the District Federal Court of Minnesota in *American Woods Product Co. v. Minneapolis*, 21 Fed. (2d) 441, which was reported in the December, 1927, issue of the REVIEW. In the instant case the petitioner, who operated a lumber yard in a section that was zoned as a residence district, was refused a permit to erect on his yard a building of concrete blocks to house his lumber and other

supplies. In sustaining the court of common pleas, which directed an issuance of the permit, the supreme court points out that the erection of the building in question would lessen the fire hazard, eliminate the tendency of undesirable persons to gather in the vicinity, conduce to the health of the community and enhance the attractiveness and value of the surrounding property. As the petitioner's business had been long established before the zoning restriction was enacted, the lands were charged with a lawful use which the city was without power to destroy. This is an illustration of the class of cases in which the zoning board of appeals should allow an exception to be made to the strict provisions of the ordinance; otherwise there seems to be no sound reason for its existence. (*Dobbins v. Los Angeles*, 195 U. S. 223; *Western Theological Seminary v. Evanston*, 156 N. E. 778.)



Police Power—Public Taxicab Stand on Railroad Property.—The Supreme Court of the United States, in a decision handed down February 21, unanimously reversed the decision of the Circuit Court of Appeals, third circuit, in *D. L. & W. R. R. Co. v. Morristown*, 14 Fed. (2d) 257, which was commented upon in the April, 1927, issue of this REVIEW. The court holds that the town does not have any right to establish a public hackstand on the driveway upon the plaintiff's premises without just compensation and that the company may grant an exclusive privilege therefor to one operator.

Mr. Justice Butler in his opinion says: "The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purposes of its business as a common carrier and, while the business is subject to regulation in the public interest, the property used belongs to petitioner. The state may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment. (Cases cited.)

"As against those not using it for the purpose of transportation, petitioner's railroad is private property in every legal sense. The driveway in question is owned and held by petitioner in the

same right and stands on the same footing as its other facilities. Its primary purpose is to provide means of ingress and egress for patrons and others having business with the petitioner. But, if any part of the land in the driveway is capable of other use that does not interfere with the discharge of its obligations as a carrier, petitioner, as an incident of its ownership and in order to make profit for itself, has a right to use or permit others to use such land for any lawful purpose."

✱

Police Powers—Reasonable Regulation of Business or of Social Activities.—Under a general delegation of the local police power a city may enact regulations which will be in effect local laws, provided they prescribe general rules of conduct fairly definite and are reasonably adapted to protect or insure the safety, health, morals or general welfare of the community. That a city may enact a valid ordinance denouncing as a disorderly person anyone who appears or travels upon the streets masked or disguised so as to conceal his identity was affirmed by the Court of Appeals of Kentucky in *Pineville v. Marshall*, 299 S. W. 1072. That an ordinance requiring barber shops to close at 7 p. m. week days except Saturdays at 9 p. m. and prohibiting colored barbers serving white children is unreasonable and void was held by the Supreme Court of Georgia in *Chaires v. Atlanta*, 139 S. E. 559.

In *New Castle v. Withers*, 159 Atl. 860, the Supreme Court of Pennsylvania held that the city by bill in equity could compel the removal of plumbing installed in the house of the defendant by her husband, a licensed plumber, which was found not to comply with the requirements of the state plumbing code. The judicial control of the courts to set aside such a statute, as dis-

tinguished from an ordinance, is limited to those cases where there is a palpable invasion of the fundamental law or where there appears upon its face that it has no real or substantial relation to the public health, safety or morals; in all other cases the legislative determination is held to be conclusive.

Where the ordinance relates directly to the public health, the means adopted to secure its enforcement is most liberally construed. In *State v. Spiller*, 262 Pac. 128, an ordinance of the city of Auburn required each home holder to keep a garbage can and deposit all garbage therein and imposed a penalty for noncompliance. It was further provided that the failure to possess such a can and the use of the city water by the home holder should constitute prima facie proof of the violation of the ordinance. The Supreme Court of Washington upheld the ordinance on the authority of *Mobile, dc. R. R. v. Turnipseed*, 219 U. S. 35. The extent to which reasonable control over the disposal of garbage by private individuals extends is set forth in *California Reduction Co. v. Sanitary Reduction Co.*, 199 U. S. 306.

The extent to which discrimination may be held to be reasonable is illustrated by the decision of the Supreme Court of Washington in *Seattle v. Gervasi*, 258 Pac. 328, in which an ordinance excepting from a Sunday closing law the sale of meals served on the premises, prepared tobacco, milk, fruit, confectionery, newspapers, magazines and medical and surgical appliance was sustained. Classification based upon the nature of the business is upheld on the ground that the law operates equally upon all persons similarly situated. A conviction of the defendant, a grocer, for a violation of the ordinance was unanimously affirmed.